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No. 94-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners

v.

RICHARD G. EVANS, et al.,

Respondents

On Petition For A Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF AMICUS CURIAE CONCERNED WOMEN FOR AMERICA, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS IN THIS CASE[1]

Amicus curiae Concerned Women for America, Inc. ("CWA") is a national non-profit organization representing approximately 600,000 persons. CWA's purpose is to preserve, protect, and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities.

CWA strongly supports protection of public morality, religious liberty, and economic liberty. CWA strongly opposes restrictions on voters' ability to protect these interests, particularly by a results-oriented creation of new "fundamental rights" in order to assist politically correct groups and restrict politically incorrect voters.

SUMMARY OF ARGUMENT

First, petitioners have demonstrated that the Colorado Supreme Court erred in creating a new fundamental right, and in therefore subjecting Amendment 2 to strict scrutiny under the Equal Protection Clause. Instead, because no fundamental right or suspect class is involved, Amendment 2 is subject only to rational-basis review.

Second, Amendment 2 should be upheld under rational-basis review, because it is rationally related to legitimate (even substantial and compelling) state interests.

Amendment 2 is rationally related to the state's in-

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[1]Counsel of record to the parties in this case have consented to the filing of this Brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

terest in protecting public morality, an interest that this Court and legal philosophers have historically recognized. It is entirely rational for the state to base legislation on moral choices (and it cannot avoid doing so). The moral choice made by Colorado voters in approving Amendment 2 was an effort to protect public morality, which is undermined by homosexual conduct and by the special homosexual rights laws that Amendment 2 repealed. Unlike race and gender, homosexuality is not a morally neutral characteristic.

Amendment 2 is rationally related to the state's interest in promoting heterosexual families and marriage, another interest with long-standing historical recognition. As the highest courts of at least two states have held, special homosexual rights laws undermine the states' policy favoring heterosexual marriage and family.

Amendment 2 is rationally related to the state's interest, a compelling interest, in protecting religious liberty. Special homosexual rights laws regularly conflict with the religious convictions of landlords, employers, churches, and religious organizations. Colorado was justified in adopting Amendment 2 to avoid those conflicts.

Amendment 2 is rationally related to the state's interest in protecting economic liberty. Special homosexual rights laws abrogate the traditional rule of autonomy and free choice in employment and other economic decisions, in favor of a group that is not a suspect or quasi-suspect class (and that is in fact affluent and politically powerful). In adopting Amendment 2, Colorado merely adhered to the long-standing interests in economic liberty.

Third, contrary to respondents' arguments, special homosexual rights laws do in fact confer special rights on homosexuals -- rights that are not enjoyed by other non-suspect classes who lack the homosexuals' affluence,

their political clout, and their claim to political correctness. Homosexuals already have the same rights everyone else has, but instead seek exemption from the general rule of autonomy and free choice that governs the activities of others. Colorado was justified in refusing to capitulate to the homosexual lobby's demands for special treatment, via a constitutional amendment adopted by a clear majority of its voters.

ARGUMENT

I. AMENDMENT 2, BECAUSE IT DOES NOT INVOLVE A FUNDAMENTAL RIGHT OR A SUSPECT CLASS, NEED ONLY BE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST.

Because Amendment 2 does not involve either a fundamental right or a suspect class, the Court applies only the "standard of rationality" to judge the validity of Amendment 2 under the Equal Protection Clause. *E.g.*, *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993).

A. The Test for Rational-Basis Review.

In *Heller*, this Court distilled decades of equal protection cases into the following statement of the rationality review standard:

> We many times have said . . . that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classifica-

tion neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because "'it is not made with mathematical nicety or because in practice it results in some inequality.'"

Heller, 113 S. Ct. at 2642-43 (citations omitted). *See also FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'").[2]

B. The Rational-Basis Test Applicable to State Constitutional Provisions.

State constitutional provisions, such as Colorado's Amendment 2 in this case, are subject to the same deferential standard. In upholding Missouri's constitutional requirement that state judges retire at age 70, this Court held:

> In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it. "[W]e will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational."
>
> . . . .
>
> . . . "In an equal protection case of this type . . . those challenging the . . . judgment [of the people] must convince the court that the . . . facts on which the classification is apparently based could not reasonably be conceived to be true by the . . . decisionmaker."

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[2]After this Court's decision in Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), some courts and commentators interpreted that case to have initiated a heightened level of review that came to be described as "active rational-basis review." In Heller, this Court put an end to that interpretation, saying explicitly that in Cleburne the Court did not "purport to apply a different standard of rational-basis review from that just described." 113 S. Ct. at 2643.

Gregory v. Ashcroft, 501 U.S. 452, 471, 473 (1991) (brackets in original) (citations omitted).

C. Any Necessary Corrections Are for the Majoritarian Democratic Process To Make.

This deference to policy choices of legislatures or of the citizens themselves (for state constitutional amendments, as in this case) is justified in part by the fact that any poor policy choice can be reversed by the same legislature or voters. As this Court held in *Vance v. Bradley*, 440 U.S. 93 (1979):

> "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Vance, 440 U.S. at 97 (quoted in *Parham v. Hughes*, 441 U.S. 347, 351 (1979)).

Contrary to petitioners' implicit argument in this case, Amendment 2 is not presumptively unconstitutional because it represents the will of the majority of Colorado's voters. That approach should be rejected, and has been rejected:

> This theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.

Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

As will be shown in Part II, the rational-basis review described above validates Amendment 2.

II. AMENDMENT 2 IS RATIONALLY RELATED TO LEGITIMATE -- IN FACT SUBSTANTIAL AND COMPELLING -- STATE INTERESTS.

A. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Public Morality.

1. Protecting Public Morality Is at Least a Substantial State Interest, under this Court's Decisions and Other Authorities.

a. This Court's Early Decisions.

For more than a century, at least, this Court has agreed that the government has a legitimate interest in protecting public morality. *See Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) ("Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, *and to the preservation of good order and the public morals*."); *Davis v. Beason*, 133 U.S. 333, 342 (1890) ("It was never intended or supposed that the [First] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and *morals* of society."); *Leisy v. Hardin*, 135 U.S. 100, 123 (1890) ("it is not for Congress to determine what measures a State may properly adopt as appropriate or needful *for the protection of the public morals*, the public health or the public safety").[3]

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[3] *See also* United States v. Watkins, 28 Fed. Cas. 419, 425, 426 (C.C.D.C. 1829) (No. 16,649):

> The interests to be protected by the government are, the public peace, the public morals, the public property, and the public justice.
>
> . . . Why are public lewdness and disorderly houses indictable offences? Because they tend to injure the public morals, they are mischievous to many, -- to an indefinite number, -- to the public at large.

b. This Court's Decisions Involving Obscenity.

In subsequent cases, this Court reiterated the same interests. In upholding a criminal conviction for mailing obscene materials in *Roth v. United States*, 354 U.S. 476, 485 (1957), the Court recognized "the social interest in order and morality" (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). This Court later described the *Roth* holding as follows:

> In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion [that there is a connection between antisocial behavior and obscene material] to protect *"the social interest in order and morality."* *Roth v. United States*, 354 U.S., at 485 . . . (emphasis added in *Roth*).

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

In *Paris Adult Theatre I*, this Court also held that "'the primary requirements of decency may be enforced against obscene publications,'" and that "legitimate state interests at stake in stemming the tide of commercialized obscenity . . . include the interest of the public in the quality of life and the total community environment." 413 U.S. at 57-58 (citations omitted). The Court also quoted approvingly an earlier dissent of Chief Justice Warren:

> As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society."

413 U.S. at 59-60 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (dissenting opinion). Finally, this Court approved the Georgia legislature's conclusion about the negative effect of obscenity on the state's legitimate interest in public morality:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

413 U.S. at 63.

c. This Court's Decisions Involving Public Indecency Statutes.

More recently, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court upheld Indiana's public indecency statute. Four members of the Court did so explicitly on the basis of the state's legitimate interest in promoting public morality. The plurality opinion stated:

> The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests. . . . [T]he statute's purpose of *protecting societal order and morality* is clear from its text and history. . . . Public indecency statutes such as the one before us reflect *moral* disapproval of people appearing in the nude among strangers in public places.
>
> . . . .
>
> This and other public indecency statutes were designed *to protect morals and public order*. The traditional police power of the States is defined as the authority to provide for the public health, safety, and *morals*, and we have upheld such a basis for legislation. [citing *Paris Adult Theatre I* and *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).]
>
> Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

501 U.S. at 569 (plurality opinion of Rehnquist, C.J.).[4]

Justice Scalia agreed in even stronger terms:

> Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *"contra bonos mores," i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." The purpose of the Indiana statute . . . is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified.

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[4] Throughout this brief, all emphasis is added unless otherwise noted.

501 U.S. at 575 (Scalia, J., concurring).[5]

d. Other Authorities.

Legal philosophers, perhaps most notably Lord Devlin, have reached the same conclusion: "there are certain standards of behavior or moral principles which society requires to be observed," and "[a] recognized morality [is] as necessary to society's existence as a recognized government." P. Devlin, *The Enforcement of Morals* 8, 13 (Oxford Univ. Press 1959). Thus, conduct cannot be viewed in isolation from its effect on society's moral consensus. *Id.* at 8.[6]

2. Legislation Based on Moral Determinations Is Rational.

a. *Bowers* Found It Not Only Rational but

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[5] *See also* D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 145 (4th Cir. 1991) ("It is also well-established that the regulation of nudity in public places advances a substantial governmental interest in maintaining order and morality. . . . [T]he interest in *morality and order* underlying the city's regulation of public nudity is a sufficiently compelling governmental interest to override some incidental effects of the communicative aspects of topless dancing."); United States v. Biocic, 928 F.2d 112, 115-16 (4th Cir. 1991) ("The important governmental interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones.")

[6] *But see* Hart, Law, Liberty, and Morality 43 (Stanford Univ. Press, 1963) (attempting to distinguish "between the immorality of a practice and its aspect as a public offensive act or nuisance").

Necessary.

This Court has made it unequivocally clear that, standing alone, moral determinations by legislators or voters are adequate rationales for legislation. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), one of the homosexual plaintiff's attacks on Georgia's criminal sodomy statute was that a moral justification for the law was inherently inadequate. The Court flatly rejected Hardwick's argument:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. *The law, however, is constantly based on notions of morality*, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis.

478 U.S. at 196. *See also id.*, 478 U.S. at 196, 197 ("Condemnation of [homosexual] practices is firmly rooted in Judeo-Christian *moral* and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of *moral* teaching.") (Burger, C.J., concurring).

b. The Result under Equal Protection and First Amendment Review Is the Same.

While *Bowers* involved rational-basis review under the Due Process Clause, the result is identical under equal protection rational-basis review and under First Amendment review. *See Barnes*, 501 U.S. at 568-69 (plurality opinion of Rehnquist, C.J.) ("Public indecency statutes . . . reflect moral disapproval of people appearing in the nude among strangers in public places. . . . [T]he public indecency statute furthers a substantial interest in protecting order and morality); *id.*, 501 U.S. at 580 ("*Moral opposition to nudity supplies a rational basis for its prohibition.*") (Scalia, J., concurring). As Judge Bork wrote in *Dronenburg*:

> Appellant denies that morality can ever be the basis for legislation. . . .
>
> . . . Appellant's theory would, in fact, destroy the basis for much of the most valued legislation our society has. It would, for example, render legislation about civil rights, worker safety, the preservation of the environment, and much more, unconstitutional. In each of these areas, legislative majorities have made moral choices contrary to the desires of minorities. It is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality. For these reasons, appellant's argument will not withstand examination.

741 F.2d at 1397.

3. Amendment 2 Protects Public Morality.

a. Colorado Has an Interest in Disapproving Homosexual Conduct, which Special Homosexual Rights Laws Would Preclude.

This Court has previously recognized the state's rational and legitimate interest in condemning

"irresponsible liaisons beyond the bonds of marriage." *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972); *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (plurality opinion of Stewart, J.). *See also Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1986) (Scalia, J.), holding that the government is entitled to voice its own approval or disapproval of ideas (and therefore of actions as well); otherwise, it would be permissible for the government "to criminalize polygamy, but not to praise the monogamous family.").

It follows that if Colorado may criminalize sodomy, and may criticize the morality of homosexual conduct while praising heterosexual marriage, it may constitutionally preclude the adoption of special homosexual rights laws.

The special homosexual rights laws that were repealed by Amendment 2 would preclude any government disapproval of homosexual behavior, with significant consequences for heterosexual marriage and other state policies, such as adoption. Professor Finnis, Oxford Professor of Law and Legal Philosophy, has written:

> It is in fact accepted by almost everyone, on both sides of the political debate, that the adoption of a law framed to prohibit "discrimination on grounds of sexual orientation" would require the prompt abandonment of all attempts by the political community to discourage homosexual conduct by means of educational policies, restrictions on prostitution, non-recognition of homosexual "marriages" and adoptions, and so forth. It is judged (and in my view soundly) that the law itself would perforce have changed from teaching, in many ways, that homosexual conduct is bad to teaching, massively, that it is a type of sexual activity as good as any other (and per se much less involved with onerous responsibilities

> than is the sexual union of husband and wife or, in perhaps other ways, the life of those who live in unmarried chastity).

Finnis, *Law, Morality, and "Sexual Orientation,"* 9 Notre Dame J. of Law, Ethics & Public Policy 11, 16 (1995).[7]

b. Homosexuality Is Not a Morally Neutral Characteristic (Such as Race or Sex), and Colorado Voters Have Therefore Determined that It Is Not Entitled to Special Protections.

i. The Majority Believe Homosexual Conduct To Be Immoral.

The empirical fact is that a majority of Americans, and obviously a majority of Colorado voters, believe homosexual behavior is immoral. Professor Duncan has compiled relevant statistics:

> For example, a 1992 Gallup Poll found that 57% of Americans deemed homosexuality an unacceptable lifestyle, with 38% believing it to be acceptable. *Arizona Republic*, Apr. 25, 1993, at A19. A major survey conducted by the Kinsey Institute in 1970 confirms that a majority of Americans believe that homosexual behavior is wrong. Albert D. Klassen et. al., *Sex and Morality in the U.S.: An Empirical Enquiry Under the Auspices of the Kinsey Institute* 26-27 (Hubert J. O'Gorman ed., 1989).

Duncan, *Who Wants To Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Free-*

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[7] An example of a state policy that would be abandoned under a special homosexual rights law is State v. Cox, 627 So. 2d 1210 (Fla. App. 1993) (state policy against homosexual adoptions upheld as rational).

dom, 69 Notre Dame L. Rev. 393, 405 n.41 (1994).

Similarly, the voters of Colorado believed, by a margin of 53.4% to 46.6%, that homosexuals should not enjoy special legal protections that are not available to anyone else who is not already in a protected or suspect class. Given the results of other polls showing the electorate's moral disapproval of the homosexual lifestyle and homosexual behavior, it is reasonable to conclude that a majority of Colorado voters did not believe that homosexuality is a morally neutral characteristic, such as race or sex. Instead, the majority of Colorado voters saw homosexuality as a characteristic or behavior that is subject to moral assessment, and they found it lacking morality.

ii. It Is Entirely Rational (and even Logically Necessary) for Colorado Voters To Link Homosexual Status with Homosexual Conduct.

Proponents of special homosexual rights protections insist that homosexuality is a status, rather than a behavior subject to moral assessment. However, it would be eminently rational for the voters of Colorado to reach the conclusion that many or most homosexuals in fact engage in homosexual conduct; i.e., that they do what they advocate and defend as an alternative lifestyle and as alternative sexual conduct. That conduct undoubtedly can be assessed morally.

The Court of Appeals for the District of Columbia Circuit reached the same rational conclusion in *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc). In *Steffan*, the court upheld (again) Naval Academy regulations and Department of Defense directives prohibiting homosexuals from attending the Academy or serving in the Navy. The court rejected Steffan's argument that his description of himself as a homosexual was no evidence that he in fact had committed or would commit homosexual acts:

> [T]he military may reasonably assume that when a member states that he is a homosexual, the member means that he either engages or is likely to engage in homosexual conduct. . . .
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> . . . That there may be exceptions to the assumption on which the regulation is premised is irrelevant, however, so long as the classification (the regulation) in the run of cases furthers its purpose, and we readily conclude that it does.
>
> . . . .
>
> . . . Although there may well be individuals who could, in some sense, be described as homosexuals based strictly on an inchoate orientation, certainly in the great majority of cases those terms are coterminous. Homosexuality, like all forms of sexual orientation, is tied closely to sexual conduct.

41 F.3d at 686, 689 (quoting then-Judge Kennedy to the same effect in *Beller v. Middendorf*, 632 F.2d 788, 808 n.20 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981). Similarly, in an earlier decision, the same court had described homosexual sodomy as "the behavior that defines the class." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (upholding FBI's refusal to hire homosexual).[8]

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[8]The court in Padula bluntly went further than the voters of Colorado have gone:

> If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

822 F.2d at 103. Colorado has stopped well short of discriminating against homosexuals (though it need not

The Seventh Circuit has reached the same result as the District of Columbia Circuit. In fact, in *Steffan*, the District of Columbia Circuit quoted the following language from *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989):

> Plaintiff's lesbian acknowledgment, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and a propensity to engage in homosexual conduct. Such an assumption cannot be said to be without exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future. The Army need not shut its eyes to the practical realities of this situation. . . .

881 F.2d at 464. *See Steffan*, 41 F.3d at 689.[9]

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under the Equal Protection Clause), and merely prohibits special protections of homosexuals.

[9]Other Courts of Appeals have also rejected challenges to rules against homosexuals in the military and state statutes against public homosexuality in public school teachers. *See* High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990) (upholding policy of expanded investigation into backgrounds of homosexual applicants for security clearances as rationally related to legitimate government interest in protecting national security); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (upholding Navy's release of reserve member from active duty); National Gay Task Force v. Bd. of Educ., 729 F.2d 1270 (10th Cir. 1984) (upholding

4. Amendment 2 Permits More Moral Freedom than Do Special Homosexual Rights Laws.

The citizens of Colorado are more free to make their own moral determinations under Amendment 2 than they were under any special homosexual rights law at the state or local level. Under Amendment 2, those who see homosexuality and its attendant behavior as immoral may choose not to rent to or employ homosexuals; those who see homosexuality as moral or at least neutral are free to rent to or employ homosexuals.[10] By contrast, as Professor Duncan has pointed out, "[u]nder [the special homosexual rights laws repealed by Amendment 2], a particular view of sexual morality, the sexual relativism of social liberals, is codified and imposed on everyone else." Duncan, 69 Notre Dame L. Rev. at 396 n.10.

As Justice Stevens has recognized, a presumption in favor of freedom from regulation is itself a rational basis for a decision not to regulate (such as Amendment 2):

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state statute providing for dismissal of public school teachers for engaging in public homosexual conduct), *aff'd by an equally divided Court*, 470 U.S. 903 (1985).

[10]Duncan and Young elaborate the contrasting levels of freedom with Amendment 2 and without it:

> Under Amendment Two and its progeny, however, employers and landlords are not forbidden from hiring or leasing apartments to homosexuals. They are completely free to do so, if they wish. The initiatives do not single out homosexuals for restrictions or prohibitions; they merely remove governmental restrictions on employers and property owners in order to protect basic civil liberties in the marketplace.

Duncan and Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?* 9 Notre Dame J. L. Ethics & Pub. Pol'y 93, 133 (1995).

> Freedom is a blessing. Regulation is sometimes necessary, but it is always burdensome. A decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom.

FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2105 (1993) (concurring opinion) (emphasis in original).

B. Amendment 2 Is Rationally Related to the Legitimate State Interest in Promoting Heterosexual Families and Marriage, which Special Homosexual Rights Laws Undermine.

1. Courts Uniformly Acknowledge the State's Right To Promote Heterosexual Marriage.

The federal and state governments have a legitimate interest in promoting marriage and heterosexual families. *See, e.g., Weber*, 406 U.S. at 175 (recognizing society's right to condemn "irresponsible liaisons beyond the bonds of marriage" and to attach negative consequences to such liaisons, such as illegitimacy for resulting children); *Parham*, 441 U.S. at 353 (plurality opinion of Stewart, J.) ("It is thus neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bonds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child."); *Griswold v. Connecticut*, 381 U.S. 479, 505 (1965) (White, J., concurring) ("the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, [is] concededly a permissible and legitimate legislative goal"), *See also Beaty v. Truck Ins. Exchange*, 6 Cal. App. 4th 1455, 1460, 8 Cal. Rptr. 2d 593, 596 (1992) ("the state's legitimate interest in promoting marriage . . . is furthered by conferring statutory rights upon married persons which are *not* af-

forded unmarried partners"); *Hinman v. Department of Personnel Admin.*, 167 Cal. App. 3d 516, 527, 213 Cal. Rptr. 410, 417 (1985) ("The State's public policy favoring marriage is promoted by conferring statutory rights upon married persons which are *not* afforded unmarried partners"; "No similar policy favors the maintenance of nonmarital relationships."); Ga. Code § 19-3-6 ("Marriage is encouraged by the law. Every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise shall be invalid and void.").[11]

The California Supreme Court has explained part of the reason for the state's strong interest in the marriage relationship:

> [T]he state's interest in promoting the marriage relationship is not based on anachronis-

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[11] A pertinent analogy is the government's "unquestionabl[e]" "strong and legitimate interest in encouraging normal childbirth, an interest honored over the centuries." Maher v. Roe, 432 U.S. 464, 478 (1977). *See also* Harris v. McRae, 448 U.S. 297, 324 (1980) ("It follows that the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life."); H.L. v. Matheson, 450 U.S. 398, 419 (1981) (Stewart, J., concurring) (recognizing state's interest "in encouraging childbirth *rather than abortion*"); Thornburgh v. Am. College of Obstetricians & Gynecologists, 476 U.S. 747, 797 (1986) (White, J., dissenting) ("we have recognized that the States may legitimately adopt a policy of encouraging normal childbirth rather than abortion"). A major difference between the childbirth versus abortion analogy and this case, however, is that abortion is one of the rights that have been said to come within the fundamental right of privacy, while homosexual conduct is not. Thus, governments should logically be even more free to encourage heterosexual marriage and families over homosexual relationships and behavior.

> tic notions of morality. The policy favoring marriage is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society."

Elden v. Sheldon 758 P.2d 582 (Cal. 1988).

2. Special Homosexual Rights Laws Necessarily Undermine the Longstanding Policy and Precedent Favoring Heterosexual Marriage.

However, special homosexual rights laws undermine that policy in favor of heterosexual marriage and family. *E.g., County of Dane v. Norman*, 497 N.W.2d 714, 716 (Wis. 1993) (county ordinance against discrimination on basis of marital status invalid because inconsistent with public policy of the state to promote the stability of marriage and the family). As the Minnesota Supreme Court explained in *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990):

> There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from [same-sex and opposite-sex cohabiting] relationships. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage. Will the fact that legal rights closely resembling those arising from conventional marriages be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?

460 N.W.2d at 10 (quoting *Mister v. A.R.K. Partnership*, 553 N.E.2d 1152, 1158 (1990)).

This negative effect on policies favoring marriage, from official recognition of homosexual relationships or conduct, provides a rational basis for Amendment 2's repeal of special homosexual rights laws.

C. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Religious Liberty.

1. Protecting Religious Liberty Is a Compelling State Interest.

As even the Colorado Supreme Court recognized, "ensuring religious freedom is a compelling governmental interest." *Evans v. Romer*, 882 P.2d 1335, 1342 (Colo. 1994) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943)). As such, Colorado's adoption of Amendment 2 to protect religious liberty that would be infringed by special homosexual rights laws satisfies rational-basis review. As will be seen below, special homosexual rights laws do in fact violate religious liberty.

2. Special Homosexual Rights Laws Violate Landlord and Employer Religious Rights.

Statutes and local ordinances in other states similar to ordinances repealed by Amendment 2 have run afoul of the Free Exercise Clause. *See Smith v. Fair Employment and Housing Comm'n*, 30 Cal. Rptr. 2d 395, 25 Cal. App. 4th 327, *review granted and opinion superseded*, 33 Cal. Rptr. 2d 567, 880 P.2d 111 (1994) (state statute prohibiting marital status discrimination in housing violates federal and state free exercise rights of landlord with religious conviction against renting to cohabiting couple (and thereby becoming complicit in the cohabitation));[12] *Attorney General v. Desilets*, 418

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[12]The court in Smith found that the compelling interest test was triggered because the case presented a "hybrid" of free exercise and free speech claims. Even if such a case in Colorado were not a "hybrid" case, the

Mass. 316, 636 N.E.2d 233, 237-38, 239-40 (1994) (same; noting additional burden on religious landlord that "both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of their religion"; also noting that the law of Massachusetts had promoted marriage but not cohabitation).[13] *But see Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) *cert. denied* 115 S.Ct. 460 (1994) (declining to apply compelling state interest test to city ordinance's application to religious landlord).[14] *See also* Duncan, 69 Notre Dame L. Rev. at 421-33 (arguing that compelling interest test should be applied even under *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

Thus, Justice Erickson's dissent in the Colorado Supreme Court was correct that "the state has a legitimate interest in protecting religious freedoms and Amendment 2 bears a rational relationship to that interest." *Evans*, 882 P.2d at 1363.

3. Special Homosexual Rights Laws Violate Church and Parachurch Organizations' Free Exercise Rights.

As Justice Erickson discussed in his dissent in the Colorado Supreme Court, some of the local special homosexual rights ordinances that were repealed by Amendment 2 infringed on religious organizations' free exercise

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compelling state interest test would apply under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq.

[13]The Massachusetts Supreme Judicial Court vacated the trial court's grant of summary judgment for the state and remanded for further factfinding on the balancing of the state's interests against the landlords' free exercise rights.

[14]The California Court of Appeal in Smith considered and rejected the reasoning of the Swanner majority, and agreed instead with the Swanner dissent. 30 Cal. Rptr. 2d at 410 n.15, 25 Cal. App. 4th 327.

rights.

> In Aspen, for example, section 13-98 of the sexual orientation ordinance required churches to open their facilities to homosexual organizations if the facilities were opened to any community organization. Churches apparently could not refuse to hire employees, including pastors or priests, on the basis of their sexual orientation. Similarly, Title 12 of the Boulder Municipal Code did not allow a church or religious organization with deeply held moral and religious views on the subject of homosexuality to refuse to hire someone based on his or her sexual orientation.

882 P.2d at 1363. The conflict between these local ordinances and the First Amendment, and the state's consequent legitimate interest in protecting against those conflicts, is all that is necessary to satisfy the rational-basis standard.

D. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Economic Liberty.

1. The General Rule Is Autonomy in Economic Decisions, Such as Employment and Property Rental.

Civil rights laws, reflecting a consensus that discrimination on the basis of race, gender, or religion is wrong, are the exception to the normal "at will" rules that have historically governed employment and landlord-tenant relationships. Professor Duncan summarized the traditional rules:

> We live in a free society, and the general principle is one of free choice. Under this view, entrepreneurs who must meet the payroll and bear the risks of the market are free to manage their businesses and properties without governmental interference. Similarly, each individual, as the exclusive owner of his or her person and labor, has a right to decide where to live and for whom to work.
>
> The traditional rule in employment law mirrors these fundamental principles and establishes a baseline of free choice and autonomy for both employer and employee. Employers are free to hire or fire "at any time and for any reason," and employees are equally free to accept employment or to quit as it may please them. Historically, the law of landlord and tenant was also governed by the principles of choice and autonomy -- landlords and tenants were free to enter into leases (or not) with whomever they chose and on any basis they chose.

69 Notre Dame L. Rev. at 399. (Again, exceptions to these general rules were properly made by civil rights laws for only narrow and strongly justified suspect classes or quasi-suspect classes such as race and gender.) *See also Dolan v. Tigard*, 114 S. Ct. 2309, 2316 (1994) ("the right to exclude others [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"); *Beach*, 113 S. Ct. at 2105 (Stevens, J., concurring) ("A decision *not to regulate* . . . . . is adequately justified by a presumption in favor of freedom.") (emphasis in original).

2. Sexual Morality Is Relevant to Economic Decisions.

The character of a prospective employee or tenant obviously is relevant to the economic decision about to be made by the potential employer or landlord. Certain characteristics, such as race, tell the employer or landlord nothing about the person's character, and are therefore illegal to consider. Sexual behavior, on the other hand, certainly can be revelatory of relevant character qualities.

> Sexual conduct and preferences are fraught with moral and religious significance. To be

> sure, not everyone agrees that homosexual behaviors and inclinations are immoral. But the point is that, unlike race, sexuality is morally controversial. When an employer or landlord makes a distinction based upon a person's sexuality, he is making a judgment about the content of that individual's character.

Duncan, 69 Notre Dame L. Rev. at 403-05.

3. Amendment 2 Protects These Economic Liberties from Restrictions.

By repealing special homosexual rights laws that abrogated the traditional at-will approach to employment and tenancy, Amendment 2 allows employers, employees, landlords, and tenants -- if they choose -- again to consider a factor that to some will be a critical indicator of moral character (and therefore of fitness for the position in question).

III. SPECIAL HOMOSEXUAL RIGHTS LAWS DO CONFER "SPECIAL RIGHTS."

Proponents of special homosexual rights laws contend that the protective legislation they seek does not provide any special rights, but only the same rights anyone else has.[15] That contention begs reality, as Professor Duncan cogently explains:

> Although employers and landlords are prohibited from taking race, gender, and religion into account when selecting employees or tenants, they remain free to make choices on the basis of other, non-protected factors. For example, it is permissible to discriminate in employ-

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[15] *See, e.g.*, Marcosson, The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights, 9 Notre Dame J. L. Ethics and Pub. Pol'y 137 (1995); Note, Constitutional Limits on Anti-Gay-Rights Initiatives, 106 Harv. L. Rev. 1905 (1993).

> ment against members of the Ku Klux Klan and similar hate groups, even if the prospective employees are otherwise well-qualified for the job. Landlords likewise are free to refuse to rent to Klansmen, pornographers, and other persons of undesirable character, even though these prospective tenants have the means to pay rent and good references from previous landlords.
>
> Therefore, when proponents of homosexual rights legislation argue that they are seeking nothing more than the same civil rights everyone else has, they are wrong for two reasons. First, they already have the same rights everyone else has, i.e., the right to be protected against discrimination on the basis of their race, gender, religion, and other protected categories. Second, since the general rule continues to be one of free choice in employment and housing matters, homosexual behavior is merely one of countless activities left unprotected by antidiscrimination laws. As we have seen, even a person's political associations, such as his or her membership in the Ku Klux Klan or other unpopular groups, are not protected activities under typical employment discrimination and fair housing laws. Since political expression and association, activities recognized as fundamental rights by the First Amendment, typically are not protected against private discrimination, the argument for "equal treatment" of homosexual behavior would appear to cut the other way.

69 Notre Dame L. Rev. at 400-401.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court for the State of Colorado should be reversed.

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Respectfully submitted,

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